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"So you thought you had a warranty?"

Common Misconceptions and Practical Advice About Construction Contract Warranties

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Introduction to Contractor's Warranties

When I was asked to address the topic of construction contract warranties, I hesitated for a moment about the rhetorical question which was proposed as its title. But, the more I thought about it, the more I liked it. The simple answer to this question for most property owners and developers is: *"Yes, of course I am the beneficiary of a construction contractor's warranty!"* Such warranties are a standard component of all current construction contract forms, whether proprietary, like the American Institute of Architects' forms, or project-specific and negotiated by the parties. But a full understanding of construction contract warranties remains a stubbornly elusive goal for many owners and developers.

Time and again, conversations about warranty rights, remedies and defenses have begun in my office with questions that demonstrated the client was one hundred and eighty degrees off the mark. Let me offer a hypothetical client situation that highlights the confusion surrounding construction contract warranties:

> *Our property owner client calls with deep concern in his voice over an increasingly worrisome problem at the project he developed and owns, now five years after substantial completion…not a new project, but certainly one with a long projected useful life ahead of it. Window leaks that began two or three years from substantial completion have grown increasingly worse, now to the point that even in mild wet-weather conditions, a significant number of units are exhibiting substantial leakage, with interior stud and drywall damage mounting with every storm. 'But, I'm out of luck, right? My contractor's warranty is long gone." And, of course, the story deteriorates: "And, I'm worried*

about the contractor …word on the street is the company's in financial trouble. I have a surety bond in the file, but that's probably useless at this point, right?"

Well, our arm-chair construction lawyer needs to take a deep breath and step back. All is not lost. In the time we have left, I hope to address the common construction contract warranty provisions, dispel a few of the myths and misconceptions that surround this topic, and perhaps highlight some recent and thought provoking developments in the law of construction contract warranties. We will talk about each of the four layers of common construction contract warranties:

- ***first,*** the contractor's warranty of "good workmanship;"
- ***second,*** the contractor's warranty of "repair;"
- ***third*** the contractor's submission of major "manufacturer" warranties to the owner; and
- ***finally,*** "implied" warranties, imposed by the law on the owner with respect to the project's design, and upon the residential construction contractor.

The Contractor's Warranty of "Good Workmanship"

Nearly every contractor provides its client with an express written warranty that its labor, equipment and materials will be "new, of good quality, free from faults or defects and will conform to the contract documents" in some fashion or another. The standard provision of the American Institute of Architects' ***A201-2007 General Conditions of the Contract*** which addresses this subject, Paragraph 3.5, is included in Appendix No. 1 to this paper.

It would be wrong, however, to conclude that these broad phrases are without limitations. A careful reading of Paragraph 3.5.1, for example, reveals that even this broadly worded promise is hemmed in by some careful "limitations." Thus, in the AIA provision, it is only ***materials and equipment*** which are warranted to be "of good quality." With respect to its ***work,*** the contractor warrants only that it will be: "…free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit…." One scholar describes such a warranty as an "in process" promise and not an "end result" promise,

> "…in which the liability of the service provider hinges on the nature of the conduct he or she provides when rendering services. Therefore "in process" is to be contrasted with a "true warranty" in that the former focuses on conduct, while the latter focuses on the end result."

The Illusive Warranty Of Workmanlike Performance: Constructing A Conceptual Framework, 72 Neb. L. Rev. 981, 1013 (1993). Presumably, AIA Paragraph 3.5.1 is written to allow for the sporadic drywall nail-pop, or the occasional poorly constructed brick mortar joint, to pass as "…inherent…" in the fact that human workers do not produce totally consistent results.

AIA Paragraph 3.5.1 also contains the standard exclusion for "…damage or defect caused by abuse, alterations…improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage." It should come as no surprise, then, that an owner who abuses installed work once it is started up will not be entitled to enforce the contractor's standard warranty obligations. ***Appeal of R. B. Hazard, Inc.,*** 1991 WL 19267 (A.S.B.C.A.), 91-2 BCA P 23,709

(1991) (government's having drained fire protection system, resulting in overspeed of pumps, voided warranty claim).

However, once the express terms of the contractor's warranty of "good workmanship" are properly understood, the savvy Owner or Developer may well be possessed of a potent weapon to insure that defective work is remedied. Applicable state law will often arm the Owner with a significant period of time during which the warranty of "good workmanship" can operate. For example, since the Pennsylvania Supreme Court's decision in ***Gustine Uniontown Associates, Ltd. v. Anthony Crane Rental, Inc.,*** 842 A.2d 334, 349 (Pa. 2004), it has been clear to Pennsylvania lawyers that the statute of limitations for defects in construction work is the basic, four-year contract limitations period (and not the six-year, catch-all limitations period, as had been previously argued). However, with respect to "latent" defects in construction, it is equally clear that many "late" arising claims can be saved by application of the "discovery" rule. As long ago as 1980, the Pennsylvania Superior Court recognized:

> "It is also the law in Pennsylvania, however, that ***in the case of a latent defect in construction***, the statute of limitations will not start to run until the injured party becomes aware, or by the exercise of reasonable diligence should have become aware, of the defect." (emphasis added).

A. J. Aberman, Inc. v. Funk Building Corp., 420 A.2d 594, 599 (Pa. Super. 1980). Local law must be consulted, since not all jurisdictions are as liberal in their determination of the date when a cause of action for defective construction work begins. ***See, e.g., Amoco Oil v. Liberty Auto & Electric Co.,*** 810 A. 2d 259 (Conn. 2002) (enforcing six year statute of limitations to bar claim for

underground tank leakage because under Connecticut law "…it is well established that ignorance of the fact that damage has been done does not prevent the running of the statute, except where there is something tantamount to a fraudulent concealment of a cause of action." 810 A.2d at 266 [internal citations omitted]).

Taken together, these principles may mean that the contractor's warranty of "good workmanship," when applied in the case of a latent defect (like our hypothetical owner's leaking windows), can render the contractor liable for a *long* period of time after the initial breach of contract (i.e., the original improper installation), and certainly for at least four years after the discovery of the defective conditions. Are there any limits on this exposure? There are, as many jurisdictions, like Pennsylvania, have enacted "statutes of repose." In Pennsylvania, twelve years after completion of construction, an action for breach of contract arising from "…any deficiency in…construction of [an] improvement…" is barred. ***42 Pa.C.S.A. §5536 (1976).*** [1] Similar laws exist in many other jurisdictions. ***See, e.g., N.J.S.A. 2A:14-1.1 (New Jersey, 2001); Conn. G.S.A. § 52-584a (Conn., 1998); Md. Code § 5-108 (Maryland, 1991); 260 Mass. G.L.A. § 2B (Mass., 1984).***

Before leaving this topic, it is also important to realize the effect this long exposure can have on the contractor's surety. With *two important qualifications*, the contractor's surety will generally remain liable for the contractor's breach of its warranty of "good workmanship" throughout the period of time that the contractor remains liable, and indeed, up to the limits imposed by a statute of

[1] Actions for "injury or death" occurring more than 10, but less than 12, years from completion, are given an additional 2 year period, but "…not later than 14 years after completion…" ***42 Pa.C.S.A. §5536(b)(1).***

repose. Bear in mind, however, that this conclusion can be affected in two important respects. ***First,*** even if extended by the discovery rule, actions on performance bonds must often be commenced within a very short time frame: in Pennsylvania, ***one*** year, not ***four*** years, from "discovery" (as in the case of the actions against the contractor). ***42 Pa.C.S.A. §5523(3) (1976). Second***, in order to preserve this length of surety exposure, the Owner must pay close heed to the terms of the performance bond offered by contractor and surety. Many performance bond forms contain their own periods of limitation. Once included in the bond form, such limitation provisions are likely to end the surety's long-term liability. Other bond forms, like the AIA's ***A312-1984 Performance and Payment Bond*** contain terms which limit the owner's rights to situations of "default" and "termination," seeking to omit broader surety liability for the contractor's other possible breaches of contract, like breach of warranty.

The Contractor's Warranty of "Repair"

No discussion of contractor warranty would be complete without reference to the second most common warranty provision in a construction agreement. For reasons more likely rooted in industry custom than contractual bargaining, nearly all construction agreements contain some promise that for a period of time --- usually one year from substantial completion of the project --- the contractor will "repair or replace defective labor, equipment or materials." The standard AIA formulation of this warranty can be found at Paragraph 12.2.2 of the ***A201-2007 General Conditions of the Contract***, and is set forth in Appendix No. 1 attached to this paper.

One commentator has suggested that "warranty of repair" clauses were added to construction contracts to address the difficulty that many owners have in getting contractors who have "de-mobilized" from a project to come back and correct problems. ***See, e.g.,*** 1 Justin Sweet, ***Sweet on Construction Industry Contracts,*** ¶ 12.11 at 393 (3d. Ed., 1996). That may only be partially true. It is unlikely that any court would ever order specific performance of such a contractual obligation. However, what such a specific obligation *will* do is give the Owner who is faced with a breach of such warranty the right to recover actual "cost-of-repair" damages, and not just diminution in market value. ***Barrack v. Kolea,*** 651 A.2d 149 (Pa. Super. 1994).

Yet, the most perplexing thing about the contractor's warranty of repair is the myth that it creates an "exclusive remedy" --- that if an Owner fails to invoke the Contractor's "repair" obligations when and as required, it will have lost all rights to recover for the consequences of defective construction work. For some period of time, contractors made a sustained effort to convince the courts of such a limitation. Time and again they asserted, usually without success, that their one-year repair obligations were "exclusive" remedies which, when not invoked by an Owner, could be set up as defenses to further liability. ***See, e.g. Norair Engineering Corp. v. Saint Joseph's Hospital,*** 249 S.E. 2d 642, 647 (Ct. App. Ga. 1978); ***Carrols Equities Corp. v. Villnave,*** 395 N.Y.S. 2d 800, 803 (App. Div., 1977); ***Baker-Crow Construction Co. v. Hames Electric, Inc.,*** 566 P. 2d 153, 156 (Ct. App. Ok. 1977); ***Newton Housing Authority v. Cumberland***

Construction Co., 358 N.E. 2d 474, 478 (Ct. App. Ma. 1977); ***Board of Regents v. Wilson,*** 326 N.E. 2d 216, 220 (App. Ct. Ill. 1975).

Fortunately for the owner-developer constituency, *standard form contracts* as far back as 1987 contained language that was designed to confirm that the one-year repair remedy was ***not*** exclusive. In its present form, ***AIA A201-2007– General Conditions of the Contract***, provides:

> **12.2.5** Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

So, no Owner employing standard AIA documents need fear this argument any longer.

It is of course possible that a *privately negotiated* form agreement may endeavor to create an "exclusive repair remedy." Even with such negotiated contracts, courts have been reluctant to find that the "repair warranty" is the contractor's sole liability for defective work. ***See, e.g., Burton-Dixie Corp. v. Timothy McCarthy Construction Co.,*** 436 F. 2d 405 (5th Cir. 1971); ***Bridges v. Ferrell,*** 685 P.2d 409 (Ok. App. 1984).

Furthermore, even under such negotiated provisions, an owner's obligations end with affording the contractor a "reasonable opportunity" to make the repairs. The clause that was at issue in the ***Barrack*** case, for example,

provided that: “These warranties shall continue for a period of twelve (12) months from the date of the settlement, and any claim made by Buyer pursuant to these warranties must be in writing to Seller and received by Seller within said twelve (12) month period from the date of the settlement. Seller's obligation under these warranties ***is limited to the repair or replacement*** of any defective materials, equipment or workmanship.” 651 A.2d at 153 (emphasis added). As the Superior Court said in the ***Barrack*** case:

> At most we interpret the exclusive remedy clause in the contract before us as requiring appellees to give appellants a reasonable time to cure defective materials and workmanship. … Here the parties settled in June. Appellees moved into the house at the end of August. By mid-October they were still experiencing difficulties with the house. They did not see any resolution to their problems in sight by year's end, nevertheless they gave appellees one final chance to rectify the situation. Appellants had exhausted all reasonable time to cure and still had not made good on their warranty.

651 A.2d at 154.

Beware the “Manufacturer’s Special Warranty”

For the major components of a construction project, it is not uncommon for the specifications to require the contractor to obtain and furnish to the owner a “special manufacturer’s warranty” covering defects in the materials or equipment provided. Most commonly, one thinks of the “twenty year roof warranty” that most owners and their design teams seek to obtain as part of the finished work. The same is true with respect to large HVAC equipment, boilers, curtainwall systems and the like. Most of the standard form contract agreements recognize this practice, as in the case of ***AIA A201-2007 General Conditions of the Contract,*** which at Paragraph 12.2.2.1 protects the owner’s right to enforce the

"…terms of an applicable special warranty required by the Contract Documents…."

Why are these special warranties so important to the owner-developer? The answer lies in the Uniform Commercial Code. For, unlike the *implied* warranties of the Uniform Commercial Code, which may be excluded by clearly written exculpatory provisions, the terms of an *express* warranty cannot be so easily avoided by a seller. In the words of UCC §2-316, "…negation or limitation…" of express warranties "…is inoperative to the extent that such construction is unreasonable." ***13 Pa.C.S.A. §2316(a) (1980).***

But these manufacturer's express warranties, unlike either ***negotiated*** or ***standard form*** contract warranties, are typically written unilaterally by the manufacturer and its counsel. And, the wary owner-developer needs to be mindful of the one sided terms, and significant exclusions, that can substantially limit the reach of such warranties.

Consider, for example, the terms of a standard 15-year roof warranty such as the one that is re-printed in Appendix No. 2 to this paper. Even a cursory reading of this special warranty reveals a number of avenues for the roof manufacturer to avoid liability:

- For the warranty to take effect, the product must be installed "…in accordance with current [company] approved specifications…": *do the owner's specifications comply?*

- Splits or breaks that arise from "…movement of any material underlying the membrane…" are excluded: *will the designed substrate materials cause a problem with the chosen roof system?*

- All post construction "…repairs must be authorized in advance in writing by [company]…": *will the owner's maintenance practices and procedures void its warranty?*

- The warranty is voided by any "…act of negligence, misuse or accident…": *what if roof failure is the result of combined causes?*

- The warranty is voided by "…lack of positive drainage…": *will the owner's design for roof drainage create warranty defenses?*

- The warranty is voided by "…chemical attacks on the system…": *could prevailing environmental conditions void the roof warranty?*

- The warranty is voided if the owner "…fails to notify [the company] of changes in usage of the building…": *should building usage have anything at all to do with the roof guaranty?*

- And, of course, "All implied warranties, including merchantability and fitness for a particular purpose, are excluded…": *should typical UCC warranties be excluded?*

These provisions create at least eight loopholes for the manufacturer to avoid its "special" warranty obligations. Can the owner-developer do anything to improve this situation?

Much will depend on the construction component involved; its installed value; and the level of competition between the suppliers of such materials interested in making a sale. The larger the component (like roofing, major HVAC equipment, principal curtain wall components, etc.); the greater the amount of the purchase order; and the more competitive the purchasing environment, the more likely it is that the owner-developer will be able to blunt, or at least limit, some of these standard exculpatory provisions. One thing is clear: the savvy owner-developer should not proceed as if it must do business on the standard terms *only*.

How can these standard exclusions be tempered? The solution starts during pre-construction design and bidding. With respect to major building

components, the owner's design team will certainly know, and may even specify, which manufacturer's components will be acceptable. Thus, the standard terms of the principal suppliers' warranties will be available for review. During pre-construction, the owner can include specification clauses, or can require the submission of "additional term" sheets as part of the shop drawing review process, by which the chosen manufacturer accepts reasonable limits on its "exculpatory clauses" as a condition of approval for the Project.

How might such additional terms help in the case of the roof warranty exculpatory clauses noted above? Consider, for example, an "additional term" sheet which provided that:

- The company represents it has reviewed the Project specifications, and has either accepted them or proposed changes to better fit its product: *thereby limiting the condition of "installation per specifications"*

- The company represents that it has reviewed the proposed (and perhaps even installed) roof substrate: *thus limiting the chance of a defense based on "movement" of substrate materials*

- The company agrees to review and comment upon proposed owner repairs within a stated time, or be "deemed" to have consented to them: *thereby limiting the condition requiring approval of owner repairs*

- When roof failure results from owner negligence as well as other causes, the company agrees that fault will be apportioned: *thus preventing negligence or misuse from becoming a total defense even when only "partially" involved*

- The company represents that it has reviewed and approved the Project's roof drainage design: *thereby limiting the "positive drainage" exclusion*

- The company agrees that prevailing environmental conditions will not form the basis for warranty exclusion: *thereby limiting the "chemical attack" defense*

- The company agrees that building usage changes have no affect on the warranty unless they affect the owner's use of the roof: *thereby limiting the "change in usage" exclusion*

- The company agrees to delete its exclusion of the implied UCC warranty terms: *thereby leaving, at least, the implied warranties of merchantability and fitness for a particular purpose intact.*

With such "additional terms" in place, the owner-developer has at least a "fighting chance" of successfully enforcing the manufacturer's special warranty in the event of a product failure. This suggestion is not merely an intellectual exercise. The foregoing "additional terms" are drawn from several *real* transactions of which the author is aware, in which roof manufacturers *did* accept such limitations on their standard terms.

Implied Warranties of the Owner and Contractor

The Owner's "Implied Warranty of Design Sufficiency

We have been devoting our attention entirely to the *contractor's* warranties, which is what most practitioners think of when asked about construction warranties. However, it bears some mention here that *the owner,* as well as the contractor, can be held legally responsible for a construction contract warranty. To understand the background, and the importance, of the Owner's warranty, attention must first be turned to a 1918 United States Supreme Court decision.

United States v. Spearin, 248 U.S. 132 (1918), arose from a contract for the construction of a dry-dock at the Brooklyn Navy Yard. Spearin was required to divert and re-locate a section of sewer pipe, and the plans directed the dimensions, materials and location of the pipe that was to be re-located.

Although Spearin re-located the sewer pipe in accordance with the design, a heavy rain caused the new sewer pipe to rupture, flooding the entire work site.[2] Spearin refused to continue with the work until the government either made changes to the design or assumed responsibility for the damage that had occurred. The government refused to do so and, in the ensuing stalemate, terminated Spearin's contract.

Spearin sued and recovered the sum due for work it had performed as well as its lost profit on the remainder of the work. In affirming that result, the Supreme Court held that a contractor is not liable when it follows the plans and specifications provided by the owner, but the results are unacceptable. In analyzing the parties' rights and duties, the Court noted that when the owner's design sets forth the character, dimensions and location of the work, the owner "…*imported a warranty* that, if the specifications were complied with, the [work] would be adequate." 248 U.S. at 137. The court also rejected the government's reliance on "…general clauses requiring the contractor to examine the site, to check the plans, and to assume responsibility for the work until completion and acceptance…." Id.

Since the Court's decision in ***Spearin***, the owner's "implied warranty" of the sufficiency of its plans and specifications has become deeply embedded in construction contract law. One commentator has found the recognition of a "*Spearin*-like warranty" under the law of at least thirty-one states, including

[2] It turned out that neither the government, nor Spearin, was aware that there was a dam in one section of the sewer pipe which would divert storm run-off to the replacement pipe during periods of heavy rain which was responsible for the flooding. The government had been aware of such floods in the past, but failed to disclose that information in the plans or to the bidders.

Connecticut, the District of Columbia, Illinois, Maryland, Massachusetts, New Jersey, Ohio, Virginia. See Bruner & O'Connor On Construction Law, §9:81, at n. 14 (2002). In Pennsylvania, we have seen ***Spearin's*** "implied warranty" developed in case law since the Commonwealth Court's decision in ***Department of Transportation v. W. P. Dickerson & Son, Inc.,*** 400 A. 2d 930, 932 (Pa. Cmwlth. 1979).

Modern ***Spearin*** litigation has focused on several interesting subsidiary questions. Three such questions have predominated:

"What is the relationship between the owner's 'implied' warranty and the contractor's 'express' warranties?" This collision of obligations is analyzed in the Third Circuit Court of Appeals' decision in ***Rhone Poulenc Rorer Pharmaceuticals, Inc. v. Newman Glass Works,*** 112 F.3d 695 (3rd Cir. 1997). In ***Rhone,*** the pharmaceutical company-owner required an opaque glass curtainwall system to be installed on a research facility. Its specifications identified three acceptable manufacturers from whom the curtainwall could be purchased, including the product number, color and type of glass for each. There was no argument that the glass which Newman supplied, from Spectrum Glass Products, Inc., was one of the specified types.

However, after installation, the opacifier coating began to delaminate. When Newman refused to remove and replace the glass, suit was filed. Not surprisingly, the owner's principal argument was that by express warranty, Newman had promised that its work would be "free from faults and defects." It obviously was not, and for the owner, that was the end of the matter. Newman,

however, took a different view, arguing that its express warranty was "…nullified by [the Owner's] implied warranty that the specified glass was adequate for use in the building." 112 F.3d at 697.

Recognizing that the parties' arguments required it to determine which "warranty" prevailed, the Third Circuit held that the contractor's *express* warranty prevailed over the owner's *implied* warranty, and accordingly reversed the summary judgment which Newman had won in the District Court. The Court explained that the express warranty against faults and defects "…explicitly allocated to [Newman] the risk that the glass would be defective…" even though "…[Newman] had virtually no discretion in carrying out its contractual obligations in light of the exacting specifications in the…" contract documents. 112 F.3d at 697-98.

Although ***Rhone*** remains good law in Pennsylvania today, the clash between the owner's implied "design" warranty and the contractor's express "workmanship" warranty has not always resulted in victory for the Owner. ***See, e.g., Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc.,*** 235 So.2d 548, 552 (Ct. App. Fl. 1970) (specifications requiring "Miami Stone" face brick absolved subcontractor of responsibility when brick failed to bond properly, even though subcontract required contractor to "remedy all defects"); ***Charles R. Perry Construction Co. v. C. Barry Gibson & Associates, Inc.,*** 523 So.2d 1221, 1223 (Ct. App. Fl. 1988) (use of exterior insulation system that was reviewed and approved by architect relieved contractor of liability under contractual repair warranty) ***Trustees of Indiana University v. Aetna Casualty & Surety Co.,*** 920

F.2d 429, 436-37 (7th Cir. 1990) (sustaining the trial court's instruction to the jury that if the contractor used bricks "…which the contract specifications required…" it should return a verdict for the contractor).

"Do the plans and specifications at issue in fact create an implied warranty of sufficiency on the part of the owner?" In one of the most recent federal reviews of the ***Spearin*** doctrine, the Court of Federal Claims began its analysis by noting the differences between what are known today as "design" vs. "performance" specifications. ***Caddell Construction Co., Inc. v. United States,*** 78 Fed. Cl. 406 (2007). Noting that in the world of government contracts, "…a jurisprudential difference exists between what are known as 'design specifications' and 'performance specifications'…" 78 Fed. Cl. at 411 (citing ***Travelers Cas. and Sur. of America v. United States,*** 74 Fed. Cl. 75 (2006), the court recognized that only "design specifications" fall under the doctrine of the ***Spearin*** decision. The Third Circuit Court of Appeals drew the same distinction in its decision in ***Aquatrol Corp. v. Altoona City Authority,*** 296 Fed. Appx. 221, 223 - 24 (3rd Cir. 2008). To determine whether a "design" or a "performance" specification exists, a court must examine the "quality and quantity of the obligations that the specifications impose." ***Caddell***, 78 Fed. Cl. at 411.

Can an owner successfully "disclaim" the Spearin implied warranty?

Spearin tells us that "general" obligations imposed upon the contractor are not sufficient to overcome the owner's implied warranty. Will more specific "disclaimers" produce a different result? Some courts have found that they will. ***See, e.g., Sasso Contracting Co., Inc. v. New Jersey,*** 173 N.J. Super. 486, 414

A.2d 603 (App. Div., 1980) (denying contractor's claim arising from inaccurate paving plans on the basis of provision that "…State assumes no responsibility whatsoever with respect to ascertaining for the Contractor such facts concerning physical characteristics at the site of the Project…"); ***S&M Constructors, Inc. v. City of Columbus,*** 70 Ohio St. 2d 69, 434 N.E.2d 1349 (1982) (denying contractor's claim arising from sub-surface water conditions in the line of the work because the contract included a provision that subsurface boring logs were "…incomplete, not a part of the contract documents and are not warranted to show the actual subsurface conditions.").

The Implied Warranties of the *Residential* Contractor

Nor are "implied" warranties solely the province of the construction owner. For more than thirty years, the law of Pennsylvania has imposed on residential construction contractors an implied warranty that the homes they build and sell to consumers will be *habitable* and constructed with *reasonable workmanship*. ***Elderkin v. Gaster,*** 288 A.2d 771, 776-77 (Pa. 1972). These implied obligations were said to spring from the superior bargaining power of the professional builder-vendor and the employment of "standard form contracts" which were hard for the consumer-buyer to negotiate.

It was not long until the Pennsylvania courts were confronted with the first obvious question following the adoption of such principles: could such implied warranty liability by the residential builder-vendor be disclaimed by contract? Twelve years after the decision in ***Elderkin***, the Superior Court dealt with this question in ***Tyus v. Resta,*** 476 A.2d 427 (Pa. Super. 1984). Because of the

important consumer protection principles that were involved, the Court held that: (a) such implied warranties could be disclaimed only by "clear and unambiguous language" and (b) disclaimer terms would be "strictly construed against the builder-vendor." 476 A.2d at 432. The impact of these limitations was fairly obvious in the case before the court: neither a "buyer inspection" clause, nor a "present condition" clause, nor an "integration clause" were deemed sufficiently clear and ambiguous to disclaim the contractor's implied warranties of habitability and reasonable construction. 476 A.2d at 432-36.

Four years later, the second obvious question came before the courts: did the ***Elderkin*** implied warranties extend to a single residential construction contract or were they limited to the builder-vendor setting of the original case? In ***Groff v. Pete Kingsley Building, Inc.,*** 543 A.2d 128 (Pa. Super. 1988), the Plaintiffs contracted for the construction of a new home on property they already owned. In response to their defective work suit premised upon ***Elderkin's*** implied warranties, the trial court granted judgment on the pleadings to the contractor, refusing to extend the ***Elderkin*** warranties to a pure residential construction contract. The Superior Court had no difficulty in reversing that decision: "...we find no reason not to apply the basic concepts leading to recognition of the implied warranty of habitability and reasonable workmanship in *Elderkin, supra,* to builders generally who contract with the general public for the construction of residential homes." 543 A.2d, at 133. Now firmly entrenched in the law of Pennsylvania, the ***Elderkin*** implied warranties have even been extended (at least partially) to the owner-lessor of mobile home sites. ***Staley v.***

Bouril, 718 A.2d 283 (Pa. 1998) (lease of an improved mobile home site, with water service, included implied warranty of habitability with respect to provision of such utilities).

Appendix No. 1
Construction Warranty Provisions

The Contractor's Standard Warranty of "Good Workmanship"

Excerpted from AIA Document A201-2007, General Conditions of the Contract for Construction:

§ 3.5 WARRANTY

§ 3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

The Contractor's Standard Warranty of "Repair"

Excerpted from AIA Document A201-2007, General Conditions of the Contract for Construction:

§ 12.2.2 AFTER SUBSTANTIAL COMPLETION

§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.4.

Appendix No. 2
A Sample Roof Guaranty

FIFTEEN (15) YEAR
ROOFING SYSTEM GUARANTEE

The Company guarantees to the above-named owner that, when the above-specified roof system is installed in accordance with current approved specifications, Company will pay all authorized costs of repairs to the roofing membrane necessary to stop any leaks which occur during a period of fifteen (15) years, from the date of completion, only as a result of any of the following causes:

1. **Deterioration of the roofing membrane or flashing system resulting from ordinary wear and tear by the elements.**
2. **Workmanship on the part of the approved roofing contractor in the application of the Roofing System.**
3. **Splits or breaks in the Membrane not caused by structural movement or failure or movement of any material underlying the roofing membrane or base flashing.**
4. **Blisters, wrinkles, ridges, fishmouths or open laps in the Membrane.**
5. **Slippage of the Membrane or base flashing.**

Obligation under this guarantee shall in no event exceed the price paid for the materials used in the project. The costs of removal or replacement of walkway or other structural appendage built over the roof's surface shall be borne by the owner.

Discoloration or other cosmetic deterioration as well as paint coatings are not covered by this guarantee.

This guarantee is valid when applied by approved roofing Contractors for approved Roofing System Specifications. All repairs must be authorized in advance in writing by Company. This guarantee is not assignable, directly or indirectly as a result of the sale of the premises or otherwise. This guarantee shall not be applicable if, in the sole judgment of the Company, any of the following shall occur:

A. **The roofing system is damaged by natural disasters including, but not limited to, floods, lightning, hail, earthquakes, wind damage, etc.**

B. The roofing system is damaged by structural movement of failure or movement of any material underlying the roofing membrane or base flashing.

C. The roofing system is damaged by acts of negligence, misuse, or accident including, but not limited to, use of roof for other than waterproofing the building, vandalism, civil disobedience or acts of war.

D. Damage to the roofing system resulting from:

- **i. Infiltration of condensation of moisture in, through, or around walls, copings, building structure or underlying or surrounding areas.**
- **ii. Lack of positive drainage.**
- **iii. Movement or deterioration of metal adjacent or built into the Roofing Membrane or base flashings.**
- **iv. Chemical attacks on the Roof System.**

E. Failure of the owner to notify in writing and receive written approval of:

- **i. Changes in the usage of the building.**
- **ii. Modifications or additions to the roofing system.**

F. Failure of the owner to properly maintain the roof.

G. Failure of the owner to comply with each and every term or condition stated herein.

Company assumes no responsibility for damage to the structure or its contents from any type of leaks, or any other consequential damages. Sole responsibility is the cost of repair of the Roofing Membrane.

OWNER RESPONSIBILITIES

In the event of a leak in the Roofing Membrane or flashing system, the owner will notify Company in writing within thirty (30) days after discovery of the leak.

The owner will notify Company in writing of any proposed modification, repair, or addition, on or through the Roof or base flashing for each situation occurring after the completion date of this guarantee. Drawings or plans showing the location of the proposed changes in the original usage of the building.

ALL IMPLIED WARRANTIES INCLUDING WARRANTIES OR MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE EXCLUDED FROM THE SALE OF PRODUCTS COVERED BY THIS GUARANTEE.